

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
CHIEF BANKRUPTCY JUDGE

1001 S.W. FIFTH AVENUE, # 700
PORTLAND, OREGON 97204
(503) 326-1536

DIANE K. BRIDGE, LAW CLERK
JAMES B. MURPHY, LAW CLERK

VIA FACSIMILE

November 15, 2006

Ann K. Chapman
Vanden Bos & Chapman, LLP
319 SW Washington, Suite 520
Portland, OR 972024

Matt Goldberg
Preston Gates & Ellis LLP
222 SW Columbia St. Suite 1400
Portland, OR 97201

Re: In re Laura Lane, Case No. 06-32879
Motion to Compel Abandonment

Dear Counsel:

The purpose of this letter is to give you my ruling on a preliminary legal issue raised in connection with debtor's Motion to Compel Abandonment.

Debtor seeks to compel the trustee to abandon debtor's residence, based on the trustee's agreement that he would abandon. Despite the trustee's agreement, he now refuses to file a notice of abandonment, based on his assessment that the property may be valuable to the estate. The question is whether the trustee is bound by his agreement to abandon, or whether he may renege on that agreement and refuse to abandon.

The facts related to this issue are not in dispute, and are straight forward. After debtor filed her bankruptcy petition, she advised the trustee that she wanted to sell her house, as she could not longer afford the payments. Debtor's real estate agent received an offer on the property. Debtor relayed the offer to the trustee, who was asked whether he wanted to negotiate the sale himself or whether he would abandon the property to debtor so she could sell it. Debtor provided the trustee with all of the pertinent information relating to the transaction, including copies of deeds of trust held by members of debtor's family and friends, which purport to secure both a stated amount as well as future advances. After receiving all of the information, the

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trustee told debtor's counsel and the real estate agent that he would abandon the property and would file a notice of abandonment.

In reliance on the trustee's representation that he would abandon the property, debtor entered into a sale agreement, which was conditioned on the trustee's abandonment. Shortly thereafter, having consulted with counsel and having determined that the property might produce value for the estate, the trustee through his counsel told debtor's counsel that he would not abandon the property.

Debtor argues that, once the trustee agreed to abandon and represented that he would file a notice of abandonment, he was contractually bound to file the notice of abandonment and to stand with debtor in support of the abandonment if there were any creditor objections. The trustee argues that, if the trustee learns that his agreement to abandon was ill advised because there is potential value in the property for the estate, his fiduciary duty trumps contract law and allows him to back out of the agreement to abandon.

Essentially, debtor's argument is that the trustee's statement that he would abandon the property was an enforceable contract, which he breached by failing to file the notice of abandonment as he had agreed. The motion to compel abandonment is in essence an attempt to specifically enforce that agreement.¹

I conclude that the trustee's agreement does not compel him to abandon the property for two reasons. First, contract formation requires not only a promise, but also consideration. Ken Hood Constr. Co. v. Pacific Coast Constr., Inc., 201 Or. App. 568, 578 (2005). An exchange of promises is consideration that will support formation of a contract. Irwin v. First Nat. Bank, 212 Or. 534 (1958).

The facts in this case are that the trustee was asked whether he would abandon, was given the information necessary to make that determination, and then said he would abandon. There does not seem to be any consideration for that agreement. The

¹ The second argument in favor of abandonment, that the property is burdensome to the estate and of inconsequential value, comes into play only if the trustee cannot be compelled to abandon based on his agreement.

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parties were not in a dispute that was being compromised, and debtor did not give the trustee anything in return for his promise. Therefore, I conclude that there was no enforceable contract that resulted from the trustee's statement that he would abandon the property. There being no contract, there could be no breach and no specific enforcement.

Second, even if the agreement is an enforceable obligation, I conclude that the trustee's fiduciary duties preclude him from moving forward with abandonment when he has learned that abandonment might not be in the best interest of the estate.

The trustee argues that his agreement to abandon did not constitute abandonment, because abandonment requires notice and a hearing. § 554(a); Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705, 709 (9th Cir. 1986). That is a correct statement of the law, but does not address debtor's argument here. The argument is not that the agreement was an abandonment, but instead is that the trustee was required by his agreement to follow through and take the necessary procedural steps to abandon once he had agreed to do so.

This argument brings into play the trustee's fiduciary duties. The trustee is the representative of the estate, who has numerous duties with regard to administering that estate for the benefit of the creditors. § 704. Those duties include maximizing the value of the estate; the trustee can be held liable for breaching that duty. In re Ferrante, 51 F.3d 1473, 1477 (9th Cir. 1995). If the trustee has information that an agreement the trustee has made is no longer advantageous to the estate, the trustee has a duty to advise the court of that information. In re Martin, 91 F.3d 389, 394 (3d Cir. 1996). It should not matter whether the relevant information is based on a change of facts or a reassessment of the trustee's legal position.

I agree with the panel in In re Mickey Thompson Entertainment Group, Inc., 292 B.R. 415, 421 (9th Cir. BAP 2003):

[A] fiduciary duty to maximize the assets of the estate trumps any contractual obligation that a trustee arguably may incur in the course of making an agreement that is not enforceable unless it is approved by the court. Everyone who deals with a bankruptcy trustee in a transaction that is not in the ordinary course of business is charged with knowledge that the law may require court approval and that a

trustee has an obligation to present all relevant facts to the court, including whether there is a more attractive solution than that which the trustee has negotiated.

(Citation omitted.)

Mickey Thompson Entertainment involved a trustee's compromise of a claim, not abandonment. The procedure for compromise is set out in Fed. R. Bankr. P. 9019, which provides that, "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." The procedure for abandonment is governed by Fed. R. Bankr. P. 6007, which requires the trustee to give notice of a proposed abandonment, and a hearing if a party in interest objects. Although the procedures differ, I conclude that the trustee's fiduciary obligation for both compromise and abandonment is the same: the trustee must provide the court with all of the information necessary to allow parties in interest to decide whether to object and to allow the court to make the required determinations. In the context of abandonment, if the trustee believes that the property has value to the estate and is not unduly burdensome, the trustee has an obligation to provide that information and not to stand silent in the face of inaccurate information.

In this case, debtor asked the trustee whether he wanted to negotiate the sale or whether he would abandon the property to debtor so she could sell it. Debtor knew that the property was the trustee's to sell and that she could do so only if the property was abandoned. After she received the trustee's assurance that he would abandon, she still made her sale contingent on abandonment, as she had to do.

Debtor does not argue that the trustee is estopped from refusing to abandon, apparently because there was no detrimental reliance caused by his agreement to abandon. Debtor argues that, if the trustee abandons the property, the homestead exemption is not implicated and she will not have to reinvest the proceeds in order to exempt them.² But debtor was willing to have the

² I express no opinion about whether, if the trustee sells the property, debtor will be legally required to reinvest the proceeds in another home in order to qualify for the homestead exemption, when debtor owned the property itself and
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trustee negotiate the sale rather than abandon the property. Therefore, it is difficult to see how the advantage she says she would receive from abandonment was lost by the trustee's agreement, when she had been willing to have the trustee sell the property himself on behalf of the estate.

Debtor is seeking a determination that, once a trustee has made an agreement to abandon property, he is bound to stand silent before the court in support of abandonment, even if he later learns that abandonment is not in the best interest of the estate. In this case, debtor's theory would even require the trustee to file a notice of abandonment that would contain either inaccurate or incomplete information. The trustee is subject to Rule 9011 in the filing of pleadings. I will not enter a ruling that would require the trustee to violate the obligations under Rule 9011 based on an agreement to do something that everyone understands is subject to notice to creditors and a hearing if anyone objects.

Therefore, I conclude that the trustee's fiduciary duties trump an agreement to abandon, when the trustee learns that the agreement was ill-advised. The new information may be either factual or legal; the trustee has an obligation, up to the time the abandonment becomes effective, to keep the court apprised of the circumstances that would affect creditors' and the court's determination of whether the requirements for abandonment are met. An earlier agreement to abandon cannot justify the trustee misleading the court about those circumstances.

This is not to say that the trustee's actions in this case should be condoned. The debtors' bar needs to be able to trust and rely on the word of trustees in order for the process to run smoothly. If a trustee has questions, either factual or legal, about whether he or she should agree to abandon property, the trustee should advise the debtor that the trustee is not yet in a position to agree to abandonment, but needs to assess the situation after obtaining all of the facts and any necessary legal advice. Agreeing to a course of action before the trustee has all of the required information is at best ill-advised.

²(...continued)
not the proceeds on the date of bankruptcy. This issue will need to be determined at a later date if the parties do not reach an agreement.

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The hearing on the trustee's objection to debtor's motion is on the calendar for Wednesday, November 22, 2006 at 1:30 p.m. If the parties want to have a status conference in advance of the hearing to discuss what will occur at that hearing, please call my calendar clerk, Candyce Senner, at 503-326-1565, and she will schedule a short hearing on Monday, November 20, 2006.

Very truly yours,

ELIZABETH L. PERRIS
Bankruptcy Judge

cc: United States Trustee (via U.S. mail)